

FEDERAL MAGISTRATES COURT OF AUSTRALIA

VYAS & ANOR v MINISTER FOR IMMIGRATION & ANOR [2012] FMCA 92

MIGRATION – Review of Migration Review Tribunal decision – refusal of a skilled residence visa – first applicant providing English language test results in support of her visa application – applicant invited to comment on outcome of verification of the test results – insufficient information provided to the applicant to enable her to meaningfully comment for the purposes of s.359A of the *Migration Act 1958* (Cth).

Competition and Consumer Act 2010 (Cth)
Criminal Code Act 1995 (Cth), s.5.6
Migration Act 1958 (Cth), ss.97, 234, 234A, 359A
Migration Amendment Regulations 2011 (No 1) (Cth)
Migration Regulations 1994 (Cth)
Statutory Declarations Act 1959 (Cth), s.11

Global Sportsman Pty Ltd v Mirror Newspapers Ltd (1984) 2 FCR 82
Houssein v Department of Industrial Relations and Technology (1982) 148 CLR 88
Minister for Immigration v Brar [2012] FCAFC 30
Paul v Minister for Immigration (2001) 113 FCR 396
Talukder v Minister for Immigration (2009) 111 ALD 405

First Applicant:	MEGHABAHEN AMITKUMAR VYAS
Second Applicant	AMITKUMAR ANANDPRASAD VYAS
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 1937 of 2011
Judgment of:	Driver FM
Hearing dates:	14 February and 13 April 2012

Delivered at: Sydney

Delivered on: 17 May 2012

REPRESENTATION

Counsel for the Applicant: Mr L Karp

Solicitors for the Applicant: Mr K Murphy
D'Ambra Murphy Lawyers

Solicitors for the Respondents: Mr O Jones
Clayton Utz

ORDERS

- (1) A writ of certiorari shall issue removing the record of the Migration Review Tribunal decision made on 12 August 2011 into this Court for the purpose of quashing it.
- (2) A writ of mandamus shall issue requiring the Migration Review Tribunal to redetermine the application before it according to law.

(i)

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY**

SYG 1937 of 2011

MEGHABAHEN AMITKUMAR VYAS
First Applicant

AMITKUMAR ANANDPRASAD VYAS
Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Migration Review Tribunal (“the Tribunal”). The decision was made on 12 August 2011. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicants Skilled (Residence) (Class VB) visas.
2. The following statement of background facts is derived from the submissions of the parties.
3. The applicants are citizens of India from the industrial city of Ahmedabad, the capital of Gujarat state in the west of that country. On

10 November 2009 they applied for sub class 886 Skilled (Sponsored) visas. The first applicant before this Court (Mrs Vyas) was the primary visa applicant. References in this judgment to “the applicant” are references to her. As at the date of the visa application, clause 886.213 of Schedule 2 of the *Migration Regulations 1994* (Cth) (“the Regulations”) stated as follows:

886.213 Either:

- (a) the applicant’s nominated skilled occupation is in Major Group IV in the Australian Standard Classification of Occupations, and the applicant has vocational English; or*
- (b) the applicant has competent English.*

4. The term, “competent English” was defined in regulation 1.15C as follows:

If a person applies for a General Skilled Migration visa, the person has competent English if the person satisfies the Minister that the person:

- (a) has achieved, in a test conducted not more than 2 years before the day on which the application was lodged:*
 - (i) an IELTS test score of at least 6 for each of the 4 test components of speaking, reading, writing and listening; or*

5. In support of her application Mrs Vyas submitted a certified copy of an IELTS test report form from centre number IN122 for a test taken on 21 February 2009 which showed results of 6.5, 6.0, 6.0, 6.5, for listening, reading, writing and speaking respectively¹. On their face these results satisfied clause 886.213(b) of Schedule 2.

6. However, on 10 December 2010 an officer of the Department wrote to Mrs Vyas to inform her that the IELTS scores provided in her test form did not match the scores on the IELTS verification website. The letter provided Mrs Vyas with an opportunity to comment before a decision was made on her application². She responded with a statutory declaration³ to the effect that due to the unavailability of suitable

¹ court book (“CB”) 18

² CB 19-20

³ CB 21

examination dates in Australia she booked two IELTS examinations in India (on 21 February 2009 in Baroda and on 7 March 2009 in Rajkot), and forwarded the best of the two to the Department.

7. She declared that on receipt of the Department's letter of 10 December 2010 she tried to contact the IELTS test centre in India and found that it had closed down. Despite her and her family and friends making enquiries, she had been unable to explain the discrepancy⁴.
8. The Minister's delegate rejected the application on 10 February 2011⁵. The reasons for decision stated that Mrs Vyas' response did not address the "inconsistencies in [her] IELTS score"⁶. As the scores supplied did not match the scores verified by IELTS it was "deemed" that the test results supplied by her were false and misleading, and therefore she did not meet clause 886.224. This provided that:

No evidence has become available since the time of application that the information given or used:

- (a) to meet the requirements of item 1136 of Schedule 1; or*
- (b) to satisfy subdivision 886.21; or*
- (c) to satisfy clause 886.221; or*
- (d) to obtain the skills assessment mentioned in subclause 886.223 (1);*

was false or misleading in a material particular.

9. As neither Mrs Vyas or her husband met the criteria for sub class 886 or any other subclass in Class VB, the application was rejected. An application to the Tribunal was lodged on 1 February 2011⁷.

THE CASE BEFORE THE TRIBUNAL

10. On 30 May 2011 the Tribunal wrote to Mrs Vyas and her husband through their migration agent⁸ inviting comment on information that

⁴ CB 21

⁵ CB 22-25

⁶ CB 23

⁷ CB 26-31

⁸ CB 35-37

would be the reason or part of the reason for affirming the decision under review. The particulars of that information were:

- *You applied for a Class VB visa on 10 November 2009. You included with your application an IELTS Test Report Form for the test you completed on 21 February 2009. That Test Report Form indicates that you had achieved the scores of 6.5; 6; 6 and 6.5 for listening, reading, writing and speaking respectively.*
- *Verification of these results indicates that in that test, you achieved the scores of 6.5; 5.5, 5.5; and 6.5 for listening, reading, writing and speaking respectively.*

11. The information was said to be relevant because it may have caused the Tribunal not to be satisfied that she had competent English as required by clause 886.213, and also because she did not meet Public Interest Criterion (PIC) 4020 and Clause 886.225 (which required PIC 4020 to be met). As relevant to this application, PIC 4020 stated as follows:

(1) *There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:*

(a) *the application for the visa; or*

(b)

(4) *The Minister may waive the requirements of any or all of paragraphs (1) (a) or (b) and subclause (2) if satisfied that:*

(a) *compelling circumstances that affect the interests of Australia; or*

(b) *compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;*

justify the granting of the visa.

(5) *In this clause:*

information that is false or misleading in a material particular means information that is:

- (a) *false or misleading at the time it is given; and*
- (b) *relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.*

Note Regulation 1.03 defines bogus document as having the same meaning as in section 97 of the Act.

12. The definition of s.97 of the *Migration Act 1958* (Cth) (“the Migration Act”) stated:

"bogus document", in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) *purports to have been, but was not, issued in respect of the person; or*
- (b) *is counterfeit or has been altered by a person who does not have authority to do so; or*
- (c) *was obtained because of a false or misleading statement, whether or not made knowingly.*

13. In his reply, Mrs Vyas’ solicitor and migration agent, Mr Murphy:

- a) reiterated Mrs Vyas’ previous contentions that the relevant testing centre in India had closed and that she was unable to make enquiries of them⁹. Her statutory declaration was attached;
- b) did not concede that the IELTS test result form was a bogus document¹⁰;
- c) submitted that even assuming the allegation that the IELTS test result form was bogus was correct, PIC 4020 implies knowledge on the part of the visa applicant that the document had false information on it at the time it was given¹¹, and that
- d) Mrs Vyas was not aware that there was a problem with her IELTS results until informed by the Department.

⁹ CB 40.2

¹⁰ CB 40.4

¹¹ CB 40.5-40.8

14. A hearing was held on 12 July 2011. Two days after the hearing, on 14 July 2011, the Tribunal once more wrote to Mr Murphy for the attention of Mr and Mrs Vyas¹². That letter, also written pursuant to s.359A of the Migration Act, provided the same particulars of information as had been previously provided (see [10] above), except that in the second dot point it was disclosed that the information relied on by the Tribunal was from the “IELTS TRF Verification website”.
15. The relevance of the information was explained as possibly causing the Tribunal not to be satisfied that clause 886.213 was met, that Mrs Vyas had given the Minister a bogus document within the meaning of s.97 of the Migration Act, as well as information that was false or misleading, and also that she had not met PIC 4020 and *inter alia* clause 886.227.
16. In reply Mr Murphy by letter dated 29 July 2011 enclosed a copy of an IELTS test taken by Mrs Vyas on 9 July 2011¹³. Once again Mr Murphy on behalf of Mrs Vyas did not concede that the IELTS test results supplied to the Department were bogus¹⁴, complained that there was insufficient information provided to permit verification of the allegations against her, and again argued that PIC 4020 required knowledge on the part of the applicant of the alleged falsity of a document. Submissions were also made pursuant to the waiver provisions of PIC 4020(4).

THE TRIBUNAL DECISION

17. The Tribunal referred to the IELTS test results sent to it under cover of the submission of 29 July 2011, and found that Mrs Vyas satisfied clause 886.223(b)¹⁵.
18. Having so decided the Tribunal moved on to decide whether the applicant met PIC 4020. It found that verification of the IELTS test results supplied by Mrs Vyas to the delegate indicated that she had not achieved the score of 6 in each of the four components of the test¹⁶. It

¹² CB 51-2

¹³ The document is not in the court book. It was referred to as having been received by the Tribunal at CB 67 [39] and is annexed to Mr Murphy’s affidavit made on 31 January 2012.

¹⁴ CB 56.4

¹⁵ CB 68 [43]

¹⁶ CB 68 [44]

found that the IELTS test result form forwarded to the Department was a bogus document within the meaning of s.97(b) of the Migration Act, and that there was evidence that Mrs Vyas had given, or caused to be given, a bogus document in relation to her visa application. Therefore she did not meet PIC 4020(1).

19. In the course of its discussion of PIC 4020 it rejected Mr Murphy's submissions about an element of knowledge or intention being a necessary element of a finding of a breach of PIC 4020¹⁷. It did not accept that the legislation differentiated between false or misleading information or a bogus document given with or without the applicant's knowledge¹⁸.

20. At [47] of its reasons, the Tribunal wrote¹⁹:

PIC 4020(1) refers to a bogus document, as defined in s. 97 of the Act. Importantly, it refers to a document that was obtained because of a false or misleading statement, whether or not made knowingly [emphasis added]. Thus, where an applicant unknowingly makes a false or misleading statement which results in a document being a 'bogus document', and such a document is given or caused to be given to the Minister, PIC 4020 will apply.

21. The Tribunal also rejected submissions to the effect that Mr Vyas' employment by an Australian company constituted either compelling circumstances that affect the interests of Australia, or compassionate and compelling circumstances that affect the interests of an Australian citizen or permanent resident, or an eligible New Zealand citizen within the meaning of PIC 4020(4).

The present application

22. These proceedings began with a show cause application filed on 31 August 2011. The applicants now rely upon an amended application filed in court by leave on 28 March 2012. There are two particularised grounds in that application:

1. *The Tribunal failed to comply with section 359A(1)(a) of the Migration Act.*

¹⁷ CB 68-69

¹⁸ CB 68-9 [46]-[47]

¹⁹ CB 69

Particulars

- (a) Failure to give clear particulars of information that was said to indicate that one of the applicants obtained IELTS test results which were different from the results that were submitted in support of the visa application.*
- (b) Failure to fully and accurately disclose particulars of the information that was said to indicate that one of the applicants obtained IELTS test results which were different from the results that were submitted in support of the visa application.*

Further particulars

- (i) Information obtained by the Minister's Department was to the effect that the IELTS test results provided to the Minister's Department were sent to the IELTS Investigation team and found by that team not to match the records held by IELTS and recorded on its verification website.*
 - (ii) The relevant information was not accurately described in the Tribunal's letter of 14 July 2011.*
 - (iii) Failure to disclose information to the effect that an officer of the Department of Immigration and Citizenship had advised the "Adelaide IMU" that,*
 - (A) The first applicant's actual IELTS scores were different from the scores that she provided, and,*
 - (B) The first applicant has provided what appears to be a fraudulent document.*
- 2. The Tribunal erred in its construction of Migration Regulations, Schedule 4, Item 4020 (Condition 4020).*

Particulars

- (a) Failure to construe Condition 4020 as including a requirement that an applicant for a visa have actual or constructive knowledge of the falsity of any document that is found to be "bogus" within the meaning of that Condition.*

23. I received as evidence the court book filed on 14 October 2011. I also received as evidence in support of the application two affidavits by the

applicants' solicitor (Kerry Murphy) made on 31 January 2012 and 19 March 2012.

24. I also received as evidence part of the affidavit of the solicitor for the Minister (Oliver Richard Jones) made on 2 March 2012.
25. The applicants complain that the Tribunal disclosed no information by which Mrs Vyas' solicitors could investigate the veracity of the information relied upon by the Tribunal, or take steps to meet it. The applicants rely upon the Federal Court decisions in *Talukder v Minister for Immigration*²⁰ and *Paul v Minister for Immigration*²¹. In the light of information disclosed to the Court in the course of the hearing of this matter, the applicants ultimately identified information that was available to the Tribunal which was, in their submission, not properly disclosed by the Tribunal.
26. In relation to ground 2, the applicants submit that the Tribunal misconstrued PIC 4020(1) by failing to recognise that an essential element of a "bogus document" within the meaning of s.97(b) of the Migration Act is that the visa applicant has knowledge that the relevant document is counterfeit or has been altered at the time the document has been submitted.
27. The Minister relies upon the decision of the Federal Court in *SZNGO v Minister for Immigration*²² and contends that the Tribunal in the present case met its obligation to provide "clear particulars" of the information that appeared material at the time of its invitation to comment.
28. In relation to the second ground, the Minister contends that there is nothing express or implicit in PIC 4020 which imports a mental element to the prohibition on the supply of a bogus document or one that is false or misleading in a material particular.

²⁰ [2009] 111 ALD 405

²¹ (2001) 113 FCR 379

²² (2010) 184 FCR 505

Consideration

Relevant visa criteria

29. The criteria for the visa are located in Part 886 of Schedule 2 to the Regulations. Clause 886.213(b) required Mrs Vyas to have “competent English”. This was relevantly defined by regulation 1.15C of the Regulations as achieving “in a test conducted not more than two years before the day on which the application was lodged” an IELTS test score “of at least six for each of the four test components of speaking, reading, writing and listening”.
30. Clause 886.225 referred to PIC 4020. PIC 4020 was inserted by the *Migration Amendment Regulations 2011 (No 1)* (Cth) (“MAR”), which commenced on 2 April 2011²³. It extended to applications “made, but not finally determined” before that date²⁴. This included the application for the visa in the present case²⁵. PIC 4020 is fulfilled where the applicant has not “given, or caused to be given” to the Tribunal a “bogus document or information that is false or misleading in a material particular in relation to ... the application for the visa”. PIC 4020 can be waived in appropriate circumstances.
31. “Bogus document” is defined by s.97 of the Migration Act as follows:
- a document that the Minister reasonably suspects is a document that:*
- (a) *purports to have been, but was not, issued in respect of the person; or*
 - (b) *is counterfeit or has been altered by a person who does not have authority to do so; or*
 - (c) *was obtained because of a false or misleading statement, whether or not made knowingly.*

²³ MAR regulation 2.

²⁴ MAR regulation 5(2)(a).

²⁵ Migration Act s.5(9)(a).

Did the Tribunal meet its obligation of disclosure under s.359A(1)?

32. The Tribunal records, somewhat cryptically, at [23] of its reasons²⁶ the circumstances which enlivened its obligation of disclosure as follows:

The applicant provided with her application the results of an IELTS test she completed in February 2009 which indicated that she achieved the scores of 6.5; 6; 6 and 6.5 for listening, reading, writing and speaking respectively. The delegate verified these results and determined that the test scores were not correct and that the applicant did not achieve the score of at least 6 in the four test components. The scores that the applicant did achieve were 6.5; 5.5; 5.5 and 6.5 for listening, reading, writing and speaking respectively.

33. The Tribunal went on at [25]²⁷ to record:

On 10 February 2011 the delegate decided to refuse to grant the visa to the applicant. The delegate referred to the IELTS test results and found that evidence had become available since the time of the application that the information given or used by the applicant was false or misleading in a material particular. The delegate was not satisfied that the applicant met cl. 886.224.

34. Further, the Tribunal records at [26]²⁸ the circumstances of the first disclosure under s.359A in the following terms:

The applicant sought review of the delegate's decision on 11 February 2011. On 30 May 2011 the Tribunal wrote to the applicant pursuant to s.359A of the Act inviting her comments on, and response to, the information which the Tribunal considered would be a reason or part of the reason for affirming the decision under review. The Tribunal referred to the IELTS results which the applicant provided with her application and the information obtained through the verification, indicating that these results were not correct and that the applicant did not achieve the score of at least 6 in each of the four test components. This was said to be relevant as the Tribunal may not be satisfied that the applicant had competent English, for the purpose of c. 886.213. It was also said to be relevant for the purpose of cl. 886.223 and PIC 4020.

²⁶ CB 64

²⁷ CB 65

²⁸ *ibid*

35. The court book contains the first Invitation to Comment that was sent to the applicants by the Tribunal²⁹. Relevantly, that letter states:

In conducting its review, the Tribunal is required by the Migration Act to invite you to comment on or respond to certain information which the Tribunal considers would, subject to your comments or response, be the reason, or a part of the reason, for affirming the decisions under review.

Please note, however, that the Tribunal has not made up its mind about the information.

The particulars of the information are:

You applied for a Class VB visa on 10 November 2009. You included with your application an IELTS Test Report Form for the test you completed on 21 February 2009. That Test Report Form indicates that you have achieved the scores of 6.5; 6; 6 and 6.5 for listening, reading, writing and speaking respectively.

Verification of these results indicates that in that test, you achieved the scores of 6.5; 5.5; 5.5 and 6.5 for listening, reading, writing and speaking respectively.

This information is relevant because it may cause the Tribunal not to be satisfied that you have competent English, as required by cl. 886.213 and the Tribunal may not be satisfied that you meet that provision.

This information is also relevant because it may cause the Tribunal to find that you do not meet Public Interest Criterion 4020 and cl. 886.225. A copy of PIC 4020 is attached for your reference.

If the Tribunal is not satisfied that you meet cl. 886.213 or PIC 41020, the Tribunal may find that you are not entitled to the grant of the visa for which you have applied.

You are invited to give comments on or respond to the above information in writing.

36. The Tribunal recorded the applicants' reply to this invitation at [27] of its reasons³⁰ in the following terms:

²⁹ At CB 36, 37

³⁰ CB 65

The applicant replied on 24 June 2011 through her representative. The representative outlined the background of the application and stated that the applicant was not aware at any time prior to the DIAC letter of December 2010 that there was anything wrong with her IELTS test scores and she had no reason to believe that the test scores were not correct. She submitted the document sent to her by the testing center in India which has since closed and she is unable to make inquiries with them. She does not concede that the IELTS test result is a bogus document and she has booked a further IELTS test to show that she has competent English. The representative submits that the information why it is alleged that the result is bogus has not been disclosed and the applicant is not in a position to verify these matters or obtain further information from the center. The representative submits that PIC 4020 implies a certain degree of knowledge that the document had false information at the time it was presented to DIAC and this can be implied from the nature of the provision designed at combating fraud and it could not be the intention of parliament that a person who is the victim of fraud would be treated in the same way as a person who knowingly submitted a bogus document as this would place the onus on the applicant to verify each document being provided. It is submitted that the applicant was not aware of the problem with the IELTS test results and should not be found in breach of PIC 4020.

37. At [28] of its reasons³¹ the Tribunal noted that Mrs Vyas provided a declaration, essentially stating that she had no knowledge of any problems with her IELTS test results. She also referred to her good standing and the fact that she had made arrangements to do a further IELTS test.
38. The issues relating to Mrs Vyas' IELTS test results were discussed with her by the Tribunal at the hearing it conducted on 12 July 2011. The Tribunal records that discussion at [30]-[38]³²:

The Tribunal noted that one of the requirements for the grant of the Skilled visa for which she has applied is that she must show competent English. The Tribunal referred to the earlier IELTS test results the applicant provided with her application, which were found to be fraudulent. The Tribunal asked the applicant whether she had achieved the test score required for competent English. The applicant [s]aid that she does not have a score of at least 6 in an IELTS test but she had done the test in the previous week and

³¹ CB 65

³² CB 65-67

she would get the results on 22 July 2011. The Tribunal asked the applicant why she has not done the test in the six months since her application was refused. She said that she gave birth to her son in September 2010 and she spent time on her baby and she could not manage her time to get the IELTS test results.

The Tribunal referred to the IELTS test results that the applicant had provided to DIAC, stating that the test scores were found not to be correct, so that it may indicate that she had provided a bogus document and that PIC 4020 may apply to her. The applicant said that when she sat her exam in India, she was in India for only a few weeks and she returned to Sydney before getting the results. The results were sent to her parents in law. The training institute picked up the results from her parents in law and sent these to her. She was not aware of who made the mistake in her results and later on she carried out some investigation. The Tribunal asked the applicant why she thought the results were changed. She said that in India, if a student achieves the score, more and more students attend the Institute for preparation and they sometimes change the results to get more students. She did some investigation but by that time the Institute was closed.

The Tribunal noted that it did not appear that the legislation made a distinction between her making the amendments to the document or those amendments being made by another person without her knowledge. The applicant's representative stated that he did not agree that there is no discretion because otherwise the provision is unduly harsh and there is nothing in the Explanatory Memorandum suggesting that the provision should be that harsh. The representative noted that even in cancellation cases, there are discretionary aspects and it cannot have been the intention of Parliament to make PIC 4020 more harsh than the cancellation provisions. The Tribunal noted that discretion may come in through PIC 4020(4). The representative drew a parallel with s.109 of the Act which allows for discretion and stated that it cannot be the parliamentary intention to make this provision harsher than other provisions. He submitted that there must be implied discretion in PIC 4020.

The Tribunal noted that s. 97 refers to false or misleading statement 'whether or not made knowingly', which suggests that even if made unknowingly, PIC 4020 will come into effect. The representative stated that s. 97 sits in a different part of the Act and is relevant to considering factors relevant to cancellation and the apparent harshness of it is mitigated through discretionary provisions relevant to cancellations. It seems unduly harsh that there is no corresponding mitigation of the harshness in PIC

4020. The Tribunal pointed out that s. 109 cancellation applies in circumstances where a person already holds a visa, usually a permanent visa, and the repercussions of the cancellation are much more serious than where a person has no visa and does not necessarily have a right to be granted a visa, and simply fails a Schedule 2 requirement, which is no different to any other Schedule 2 requirements.

The representative stated that it cannot be the intention that an applicant who has no involvement and has no control over the situation would be penalised in such way. The representative referred to the reasoning in *Dai* which found condition 8202 to be invalid because it penalised an applicant over something that had no control over. The Tribunal noted that there is nothing in the words of the legislation supporting his interpretation. The representative stated that it must be implied because there is no intention to punish a person who had no involvement in perpetrating the fraud.

The Tribunal noted that the suggested interpretation would imply an entirely new and additional process requiring a decision-maker to establish who perpetrated the fraud and whether an applicant had any involvement in it, or knowledge of it. The representative stated that having regard to the Explanatory Memorandum, the purpose of the provision was to address a different problem of people putting in fake documentation and a person who may be entirely innocent of the fraud would face the same punishment as a person who is guilty of the fraud and there is no other provision in the legislation that punishes an innocent party as much as the guilty and this provision cannot operate more strictly than any other provision, including character and cancellation provision. The representative submitted that there is an implied requirement to assess whether the applicant has been involved in the perpetration of the fraud. The Explanatory Memorandum suggests that the purpose of the provision is to punish people who provide false documents and not innocent parties.

The Tribunal invited the applicant to talk about compelling reasons affecting the interests of Australia or compelling or compassionate interests affecting an Australian citizen or permanent resident or an eligible New Zealand citizen. The applicant invited the Tribunal to take evidence from her spouse. Mr Vyas stated that he works as the Operation Warehouse Manager at the Fruit Box. The business supplies fruit to corporate offices and he manages people responsible for packaging and delivering. The Tribunal asked Mr Vyas why he

thought these circumstances were compelling or compassionate. He said that he manages the Sydney branch and nobody else knows what to do. The Tribunal asked him whether it was possible to train another person to do the job. He said that nobody is there to do the job. The Tribunal pointed out he had been trained to do the job and it is not apparent why another person cannot be trained to do the job. The Tribunal noted that while his knowledge and experience may affect the business, this did not necessarily mean that the circumstances were compassionate or compelling.

The applicant said that her husband has been working for four years. He manages work in the workplace and checks the quality and it would be hard for the company if he was not there. The Tribunal again noted that while it may affect the company, this does not mean that it affect the interests of Australia or of Australian citizens or permanent residents or eligible New Zealand citizens and, further, it does not mean that the circumstances were compelling or compassionate. The representative stated that the company was planning to expand in NSW and without the applicant it would be difficult to do. It may affect the interest of Australia in that it may affect the company's operations and the company's inability to expand may affect Australian citizens or permanent residents.

The applicant undertook to provide additional evidence concerning the discretionary considerations, as well as the results of her last IELTS test.

39. For some reason, the Tribunal felt the need to issue Mrs Vyas a second Invitation to Comment on 14 July 2011. Curiously, the Tribunal does not mention that second invitation in its reasons. The invitation is reproduced in the court book at CB 51-52. The information disclosed in the invitation was essentially the same as in the first invitation, except that the particulars in the second invitation were as follows:

- *You applied for a Class VB visa on 10 November 2009. You included with your application an IELTS Test Report Form for the test you completed on 21 February 2009. That Test Report Form indicates that you have achieved the scores of 6.5; 6; 6 and 6.5 for listening, reading, writing and speaking respectively.*
- *Information from the IELTS TRF Verification website indicates that in that IELTS test, you achieved the scores of*

6.5; 5.5; 5.5 and 6.5 for listening, reading, writing and speaking respectively.

40. Mrs Vyas responded to the Invitation to Comment through her lawyers by letter dated 29 July 2011. Curiously, the Tribunal does not record that response as a response to the Invitation to Comment but at [39] of its reasons³³ the Tribunal records the correspondence as a submission. The Tribunal notes that Mrs Vyas provided the results of the further IELTS test she completed on 6 July 2011 in which she achieved a score of at least 6 in each of the four components of the test. The Tribunal also records that in the submission, Mrs Vyas repeated her earlier submission that she was unaware that there was anything wrong with the earlier IELTS test until she received correspondence from the Minister's Department. The Tribunal notes that Mrs Vyas does not concede that the document she provided was a bogus document and that she claimed that she had not been provided with information regarding why it is alleged that it is bogus. The Tribunal was therefore on notice, and expressly conceded in its reasons, that the applicant was complaining that she had not been provided with information in order for her to understand the basis upon which it was alleged that she had provided a bogus document.
41. A difficulty which confronted me at the trial of this matter (which was ultimately heard over three days following the provision of additional information) was that it was not apparent to me what "verification of these results" involved. In particular, it was not apparent whether some process of re-marking had been followed (which would logically have invited comment on the differences that might arise in different subjective appraisals) or whether the assertion was that the scores presented by or on behalf of Mrs Vyas were not the scores she in fact received on the test. The additional information disclosed in the affidavit of Mr Jones satisfies me that the assertion was intended to be the latter and that there exists a process whereby institutions administering IELTS tests supply the results to a central agency in the UK as well as to the person undertaking the test, and that, in the present case, the two sets of results did not match. The applicants' contention is essentially that the Tribunal needed to disclose the

³³ CB 67

information that would enable Mrs Vyas to address the real issue (as was ultimately disclosed to the Court).

42. It is important to bear in mind that the issue had previously been considered by the delegate and was dealt with in the delegate's reasons³⁴. The applicants had already been given an Invitation to Comment by the delegate and had provided a response on 7 January 2011, although that response did not address the inconsistencies in the IELTS score. The delegate records in his reasons³⁵:

The IELTS test scores you have provided do not match the scores verified by IELTS. It is therefore deemed that the IELTS test report provided by you was false and misleading. As a result you do not meet the requirement of regulation 886.224.

43. The same finding was repeated in relation to an alternative sub class of visa hypothetically available.
44. Section 359A(4)(b) of the Migration Act provides that the obligation of disclosure under s.359A(1) does not apply to information that the applicant gave for the purposes of the application for review.
45. During the course of the trial of the matter before me, I invited submissions from the parties on the decision of the Full Federal Court in *Minister for Immigration v Brar*³⁶ which had been decided on 21 March 2012. That case was addressed in argument on the final day of the trial of this matter on 13 April 2012.
46. In that case at [74] the Court said:

The appellant's second submission that s 359A of the Act did not apply to the information in the Tribunal's letter because it was information that the respondent gave for the purpose of the application for review was not raised before the Federal Magistrate. It is raised in the appellant's notice of appeal. In view of our conclusion in relation to his first submission it is not strictly necessary for us to consider it. However, we will indicate our view of the submission because of the contention the respondent seeks to raise. We would decide the submission in the appellant's favour because it seems to us that the information in

³⁴ CB 22-25

³⁵ CB 23

³⁶ [2012] FCAFC 30

the Tribunal's letter is substantially the same as that in the Delegate's record of decision and, following the decision of Sundberg J in Minister for Immigration and Citizenship v Chamnam You [2008] FCA 241, the information given to the Tribunal need not be information an applicant relies on. In those circumstances, the exception in s 359A(4)(b) applied.

47. Somewhat surprisingly, the solicitor for the Minister was in agreement with counsel for the applicants that the decision in *Brar* was either not relevant or could be distinguished³⁷. These are adversarial proceedings and it is not open to me to resolve the issue in this case on a basis not addressed by the parties.

48. In *Talukder*, Edmonds J held that the words, “no evidence has become available” in the former Clause 880.224 of Schedule 2 of the Regulations required a consideration of the probative value of the subject information to determine whether it amounts to evidence. I accept that the same construction should be given to the similar wording of PIC 4020(1). The Tribunal in this case may be said to have carried out the necessary enquiry³⁸.

49. The information by which the Tribunal considered that PIC 4020(1) applied was:

*Information from the IELTS TRV Verification website [which] indicates that in [the relevant] IELTS test, [Mrs Vyas] achieved the scores of 6.5; 5.5, 5,5; and 6.5 for listening, reading, writing and speaking respectively.*³⁹

50. This was information which came within the provisions of s.359A of the Migration Act.

51. The particulars of information provided in the Tribunal's s.359A letter of 14 July 2011 indicate that that enquiry consisted of an examination of the IELTS TRV Verification website which I was told cannot be accessed by members of the public, including, it appears, migration agents without a Login ID or password⁴⁰.

³⁷ Transcript, 13 April 2012, pages 21-24

³⁸ see CB 68 [44] read with CB 69 [51]

³⁹ CB 51

⁴⁰ See the affidavit of Kerry Murphy made on 31 January 2012

52. In *Paul v Minister for Immigration*, Allsop J said of the comparable provision governing the Refugee Review Tribunal's procedure, at [104]:

The evident purpose of s. 424A is to play its part in the provision of a procedural analogue to the common law of procedural fairness. I think s 424A should be looked at with a purpose in mind of ensuring that the claimant is fairly informed of information adverse to his or her case (in the manner described by the section) so that investigation may be made, and steps may be taken, somehow, if possible, to meet it. The extent of particulars of any information should be looked at in a common sense way in the context of the matter in hand and with fairness to the applicant in mind.

53. In this case the Tribunal already had Mrs Vyas' statutory declaration to the effect that she had tried to make enquiries with the IELTS test centre at Baroda, but that that institution had closed down⁴¹. There is no indication that the Tribunal rejected or did not believe Mrs Vyas' claim in this respect. Yet it gave no information by which Mrs Vyas' solicitors could investigate the veracity of the information relied upon by the Tribunal, or take steps to meet it. It appears to have been a common assumption at the Tribunal hearing that the test scores provided by Mrs Vyas to the Minister's Department were wrong, but there was no clear explanation why they were wrong. The Tribunal appears to have proceeded at the hearing on the basis that the test results submitted to the Minister's Department had been fabricated, but the Tribunal did not go through the process of oral disclosure provided for in s.359AA of the Migration Act. The Tribunal itself recognised the need for a further opportunity to comment after the hearing by sending the second Invitation to Comment. But the second invitation was hardly more informative than the first one.

54. The additional information which was available to the Tribunal and which was not disclosed to Mrs Vyas is annexed to the affidavit of Mr Jones made on 2 March 2012. In his affidavit made on 19 March 2012, Mr Murphy deposes that if the Tribunal had provided that information he would have made further enquiries to attempt to verify whether the information on the IELTS website is dated the same date as the IELTS test sheet (bearing in mind that Mrs Vyas undertook two tests in India

⁴¹ CB 21

in close proximity to one another) as well as testing certain assumptions made by the Minister's Department. I accept from that evidence that if further and better particulars of the information had been provided by the Tribunal there was the potential for a more useful response to be made on behalf of Mrs Vyas. I further accept the applicant's submission that the particulars provided by the Tribunal were not sufficient for Mrs Vyas to understand and usefully respond to the allegation of fraud, which was the unstated basis of the invitation to comment.

55. The Tribunal thus failed in its obligation to give clear particulars of the information requiring disclosure. In particular, the Tribunal needed to explain in its Invitation to Comment what the "verification" of Mrs Vyas' test results involved. Mrs Vyas needed to understand that the information or inference she was being asked to respond to was that the test results she provided were not the test results she had achieved in the tests she had undertaken (in other words, they had been fabricated) and not simply that someone had examined the test and had formed a subjective opinion that she did not merit the test results she had in fact achieved.
56. In view of the failure of the Tribunal to meet its obligation of disclosure under s.359A(1) the applicants are entitled to the relief sought in the amended application.

Does condition 4020 contain a mental element?

57. Although it is not strictly necessary to do so, I find that the second issue raised in the amended application should be resolved against the applicants for the reasons advanced by the Minister in his submissions.
58. The applicants' contention in relation to this ground is not supported by authority. The applicants' reliance on s.97(c) of the Migration Act is misplaced. Doing so echoes the maxim *expressio unius et exclusio alterius*, which the High Court has said "must always be applied with care" and "only when the intention it expresses is discoverable upon the face of the instrument".⁴² It is, in other words, question begging and subject to context and purpose.

⁴²*Houssein v Department of Industrial Relations and Technology* (1982) 148 CLR 88, 94

59. Here, the context is as follows. The critical words are “given, or caused to be given” in PIC 4020. The question is whether the provision of a document to the Minister’s Department requires the person doing so to know the document is a “bogus document”. Section 97 has a different focus. It concerns the creation of the “bogus document”. The person involved in its creation may or may not have knowledge of its inaccuracy. They may or may not be the same person who provides the document to the Minister’s Department. The question of whether the latter person *must* have knowledge remains open.
60. PIC 4020 does not simply refer to the giving of a “bogus document”. It also refers to the giving of information that is “false or misleading”. In *Murphy v Farmer*,⁴³ the High Court was considering a provision in customs legislation using those terms as a trigger for forfeiture of goods to the Crown. The Court held that:
- the word "false", when viewed in isolation, is a latently ambiguous one. As the dictionaries confirm, it can mean merely "untrue" or "wrong". Or it can involve both subjective and objective elements and mean "purposely untrue".*⁴⁴
61. The High Court was moved to read “false” as “purposely untrue” because the forfeiture provision was “penal or quasi-penal in character” and should be construed, in an ambiguous case, against the imposition of a penalty. It was thus a narrower penalty with a knowledge requirement rather than a wider penalty without one.
62. It would be consistent with *Murphy* for some provisions of the Migration Act to have a mental element. For example, ss.234 and 234A create offences relating to the provision of false documents and false or misleading information. Both attract heavy fines or imprisonment. As *Murphy* suggests, such penalties should flow from a “guilty mind” rather than unknowing conduct. It is unsurprising, therefore, that a mental element is introduced into ss.234 and 234A of the Migration Act by s.5.6 of the Criminal Code.⁴⁵

⁴³*Murphy v Farmer* (1988) 165 CLR 19

⁴⁴*Ibid* 26

⁴⁵*Criminal Code Act 1995* (Cth)

63. Other legislation creating offences relating to the provision of false information specifically mention a mental element. A pertinent example is s.11 of the *Statutory Declarations Act 1959* (Cth), which states:

A person must not intentionally make a false statement in a statutory declaration

Penalty: Imprisonment for 4 years

64. By contrast, some provisions concerning false information outside of the criminal context do not expressly contain a knowledge requirement. Nor is one implied. One example of a federal legislative provision where a mental element has been neither expressed nor implied was s.52 of the *Trade Practices Act 1974* (Cth)⁴⁶, which prohibited misleading or deceptive conduct by corporations.⁴⁷ Doubtless, the importance of the consuming public not being misled or deceived was considered to outweigh the importance of restricting the civil liability of corporations.
65. PIC 4020 is comparable. Its purpose is not penal or quasi-penal. Rather, it seeks to ensure that an applicant for a visa truly fulfils the criteria for the visa. The provision of a document that is bogus or false or misleading information would, left unchecked, enable a person who falls short of visa criteria nonetheless to be granted a visa. In this respect, it does not matter whether the document is provided by the applicant knowingly or unwittingly. Either way, a prohibition on the provision of relevantly defective documents is required. Otherwise, undeserving applicants could receive a visa.
66. This is borne out by the Explanatory Statement (ES) to the MAR, which states:

*It is intended that the reference to “information which is false or misleading in a material particular” in the new subclause 4020(1) will capture **any information** which is false or misleading that the applicant provides if it is relevant to the purpose for which it is made, namely the purpose being the **assessment of the applicant against any of the criteria for the grant of the visa.** (emphasis added)*

⁴⁶ now see s.18 of Schedule 2 to the *Competition and Consumer Act 2010* (Cth)

⁴⁷ *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82, 88

67. The ES thereby describes information broadly, emphasises the importance of the fulfilment of visa criteria and makes no mention of the state of mind of the party providing the information.
68. It follows that, in using the words “given or caused to be given”, PIC 4020 should not be construed as importing a mental element. The Tribunal interpreted PIC 4020 correctly in its reasons at [46]-[48]:⁴⁸

The Tribunal does not accept the applicant's submissions. The Tribunal does not accept that the legislation makes any distinction between false or misleading information being provided with the applicant's knowledge and complicity or without such knowledge and complicity. The words of the legislation are unambiguous. PIC 4020(1) simply refers to evidence that the applicant has given, or caused to be given, a bogus document or information that is false or misleading. It does not refer to such information being given 'knowingly' Once it is established, as a matter of fact, that there is evidence that the applicant has given, or caused to be given, a bogus document or information that is false or misleading in a material particular, PIC 4020 applies irrespective of how such document or information came into existence or came to be given.

PIC 4020(1) refers to a bogus document, as defined in s. 97 of the Act. Importantly, it refers to a document that was obtained because of a false or misleading statement, whether or not made knowingly Thus, where an applicant unknowingly makes a false or misleading statement which results in a document being a 'bogus document' and such a document is given or caused to be given to the Minister, PIC 4020 will apply. In the Tribunal's view, and despite the applicant's claim that s. 97 appears in a different part of the Act, this is contrary to the applicant's submission that the legislation requires a degree of knowledge and complicity on the part of the applicant.

The applicant argues that it cannot be the intention of the parliament that this is to place onus on the applicant to verify each document being provided.' However, the Explanatory Statement to Migration Amendment Regulations 2001 (No. 1) provides that s.97 of the Act generally places obligations on applicants to provide correct information and to correct any incorrect information, and it is intended that the reference to 'information which is false or misleading in a material particular' in subclause 4020(1) will capture any information which is false

⁴⁸ CB 68-69

or misleading that the applicant provides if it is relevant to the purpose for which it is made, namely, being the assessment of the applicant against any of the criteria for the grant of the visa for which he or she has applied, or a visa held in the 12 months before the application was made.

Conclusion

69. The applicants have established jurisdictional error in the decision of the Tribunal and should receive relief in the form of the constitutional writs of certiorari and mandamus.
70. I will hear the parties as to costs.

I certify that the preceding seventy (70) paragraphs are a true copy of the reasons for judgment of Driver FM

Date: 17 May 2012